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Kerajaan Malaysia v Ambiga Sreenevasan & Ors

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(NCVC)(W)-48–02 OF 2015
ROHANA YUSUF, VARGHESE GEORGE AND MARY LIM JJCA
23 AUGUST 2016

C *Tort — Negligence — Duty of care — Breach of — Whether sustainable cause of action existed against defendants as organisers of assembly — Whether s 6(2)(g) of the PAA created statutory duty of care on defendants — Whether government had common law right to file present claim in negligence against defendants — Whether participants of assembly caused damage to government property*
D *— Whether defendants breached any duty of care — Counterclaim — Wrongful arrest and detention — Whether arrest unlawful exercise of power — Whether counterclaim for unlawful arrest and detention could be sustained — Damages for injuries suffered while in police custody — Whether seventh defendant sufficiently established case of pain and injury on balance of probabilities — Whether trial*
E *judge erred in awarding damages of RM5,000 for injuries inflicted — Whether trial judge justified in awarding RM10,000 aggravated damages*

The 15 defendants were at all material times the organisers of an assembly held to call for clean and fair elections or the Bersih 3.0 Assembly ('the assembly').
F The assembly was held on 28 April 2012 in the surroundings of the Dataran Merdeka. It was alleged that the assembly had not been carried out in a peaceful manner and that the participants had caused damage to government property, namely 16 police vehicles. The government thus commenced a suit against the defendants seeking, inter alia, a declaration that the defendants had breached
G their obligations under s 6(2)(g) of the Peaceful Assembly Act 2012 ('the PAA') or alternatively that the defendants were negligent and had breached their common law duty or were vicariously liable for the damages sustained by the government. Ambiga Sreenevasan ('the first defendant') filed a counterclaim in this suit seeking a declaration that s 6(2)(g) of the PAA was unconstitutional for
H being inconsistent with arts 5, 8, 9 and 10(1) of the Federal Constitution, while Dr Ahmad Farouk bin Musa ('the seventh defendant') also counterclaimed on the grounds that s 6(2)(g) was ultra vires the Federal Constitution and also claiming general and aggravated damages for his wrongful detention and injuries suffered as a result of the assault he had been subjected to while in
I police custody. The trial judge found that s 6(2)(g) of the PAA was constitutional but that there was insufficient evidence to prove that the damage claimed was caused by legitimate participants at the assembly. Further the defendants were found not to be in breach of their common law duty of care. Consequently, the government's claim for breach of the PAA and claim for

special damages was dismissed. The trial judge also dismissed the first defendant's counterclaim. However, the trial judge found sufficient evidence to substantiate a case of wrongful assault, wrongful arrest and detention of the seventh defendant and accordingly allowed the seventh defendant's counterclaim. The trial judge thus awarded the seventh defendant damages of RM5,000 for assault, RM6,000 for wrongful arrest and detention and RM10,000 aggravated damages. This was the government's appeal against a part of the trial judge's decision, namely the refusal to declare the defendants liable for breach of a statutory duty under s 6(2)(g) of the PAA, the dismissal of the government's claim for special damages and the decision to allow the seventh defendant's counterclaim. According to the government, s 6(2)(g) of the PAA created a statutory duty of care on the defendants as the organisers of the assembly. Thus, the government submitted that the defendants ought to be held collectively liable for all the damages that flowed from a breach of s 6(2)(g) of the PAA. It was also the appellant's contention that the government should be able to have recourse to the rights provided in statutes including the PAA, just like any other citizen.

Held, dismissing the appeal on the breach of duty of care by the defendants and allowing the appeal against the counterclaim of the seventh defendant in part:

(1) **(per Rohana Yusuf JCA)** There was no reason to disturb the well-reasoned findings of the trial judge that the seventh defendant had sufficiently established a case of pain and injury on a balance of probabilities. Based on the facts and circumstances of this case, the claim of the seventh defendant for damages should not be denied purely on the failure to name the tortfeasor. It would be an affront to public conscience to deny a claim supported by clear uncontested evidence, as in this case simply because the tortfeasor could not be named. This was not to say that the requirements of ss 5 and 6 of the Government Proceedings Act could be dispensed with. However, the failure of the government to raise this non-compliance promptly, especially before the evidence was adduced to substantiate the allegation had compromised its own position. As such, the evidence of injury of the seventh defendant while he was under the care and custody of the police after he was arrested could not be ignored (paras 12, 16, 18–21).

(2) **(per Rohana Yusuf JCA)** Although the seventh defendant was entitled to damages for the injuries he suffered while in police custody, the arrest and detention of the seventh defendant was not an unlawful exercise of power. The police are authorised under the CPC and the Police Act to exercise the power to arrest and detain a person for the purpose of preserving peace and tranquility and the facts and circumstances of the present case warranted police interference with a view of preserving peace and order. The arrest that led to the six hour detention was within the authority exercised under s 23 of the CPC and could not render the

detention unlawful. As such the trial had erred in finding that the seventh defendant had made out a case of wrongful arrest and detention. Thus the counterclaim for unlawful arrest and detention could not be sustained. However, the trial judge was correct in awarding the seventh defendant damages of RM5,000 for the injuries inflicted on the seventh defendant while he was in police custody. Further, the trial judge had also justified the award of aggravated damages in this case. Hence the seventh defendant was entitled to the damages of RM5,000 for pain and injury from the assault and the aggravated damages of RM10,000 (paras 22–24 & 27).

(3) **(per Varghese George JCA, supporting)** The primary objective of s 6(2) of the PAA was to provide for measures to regulate the citizen's right to organise and participate in peaceful assemblies. The choice of the word 'ensure' in s 6 of the PAA did not connote that the carrying out of any particular responsibility was a 'must' or a legally binding and imperative obligation. If it was the intention of the Legislature to impose a statutory civil liability or some penal sanction for failure to comply with the assigned responsibilities on the defendants as the organisers of the assembly, this would have been specifically provided for within the PAA itself by the Legislature. However, it was clear that the provisions of s 6 and in particular s 6(2)(g) of the PAA did not impose a statutory duty or liability on the organisers, and no right of a private cause of action arose even if there was any violation or some failure to abide with the responsibilities on the part of the defendants (paras 47–48, 50 & 52).

(4) **(per Varghese George JCA, supporting)** In relation to the issue as to whether the government could bring a common law action in negligence against the defendants, it was evident that even if a cause of action in common law was maintainable by the government, the trial judge was justified in finding that on the evidence it could not be concluded that the genuine participants at the assembly were the ones who had caused the damage to the police vehicles. As noted by the trial judge it was intriguing that the police who had all the technological means at their disposal were unable to identify definitely the particular participant or participants who caused damage to the police vehicles. In the circumstances there was no reason to interfere with the findings of the trial judge, who found that the defendants as organisers of the assembly had not breached any duty of care on the facts (paras 66, 68 & 70).

(5) **(per Mary Lim JCA, supporting)** The government was not like any other citizen in that its right to sue was to be read subject to the Government Proceedings Act 1956 ('the Government Proceedings Act') and any written law. Under s 3 of the Government Proceedings Act which should be read subject to s 39 of the Government Proceedings Act the right of the government to sue only arose when the written law provided

for a specific right of action. However, a perusal of the PAA did not show the creation of such a right. The only two rights provided for in the PAA were to be found in ss 4 and 5 and that was in respect of the right to organise an assembly or participate in an assembly and the rights of persons who have interests. Neither the police nor the government could associate themselves to be such persons since s 12 of the PAA provided for how the interests of such persons were to be dealt with by the police. In the absence of express words to the contrary and given the character of rights found in the PAA, it would put a tremendous strain on the interpretation and construction of the Act if this court were to find in favour of the government (paras 77, 84, 86 & 89).

[Bahasa Malaysia summary

Kesemua 15 defendan pada setiap masa matan merupakan penganjur-penganjur perhimpunan yang diadakan untuk memanggil pilihanraya bersih dan adil atau Perhimpunan Bersih 3.0 ('perhimpunan tersebut'). Perhimpunan tersebut telah diadakan pada 28 April 2012 dalam persekitaran Dataran Merdeka. Ia dikatakan bahawa perhimpunan tersebut tidak dijalankan secara awam dan bahawa peserta-peserta telah menyebabkan kerosakan kepada harta kerajaan, iaitu 16 kenderaan polis. Kerajaan dengan itu telah memulakan guaman terhadap defendan-defendan memohon, antara lain, deklarasi bahawa defendan-defendan telah melanggar tanggunjawab mereka di bawah s 6(2)(g) Akta Perhimpunan Aman 2012 ('APA') atau secara alternatif bahawa defendan-defendan telah cuai dan melanggar kewajipan common law mereka atau bertanggungjawab secara vikarius untuk kerosakan yang dialami oleh kerajaan. Ambiga Sreenevasan ('defendan pertama') telah memfailkan tuntutan balas dalam guaman ini memohon deklarasi bahawa s 6(2)(g) APA tidak berperlembagaan kerana tidak konsisten dengan perkara-perkara 5, 8, 9 dan 10(1) Perlembagaan Persekutuan, manakala Dr Ahmad Farouk bin Musa ('defendan ketujuh') juga menuntut balas atas alasan bahawa s 6(2)(g) adalah ultra vires Perlembagaan Persekutuan dan juga menuntut ganti rugi am dan tambahan kerana penahanan salahnya dan kecederaan yang dialaminya akibat serangan yang dikenakan terhadapnya semasa dalam jagaan polis. Hakim perbicaraan mendapati bahawa s 6(2)(g) APA adalah berperlembagaan tetapi tidak terdapat keterangan yang mencukupi untuk membuktikan kerosakan yang dituntut disebabkan oleh peserta-peserta yang sah di perhimpunan tersebut Selanjutnya defendan-defendan didapati tidak melanggar kewajipan berjaga-jaga common law mereka. Berikutan itu, tuntutan pelanggaran APA dan tuntutan untuk ganti rugi khas kerajaan telah ditolak. Hakim perbicaraan juga menolak tuntutan balas defendan pertama. Walau bagaimanapun, hakim perbicaraan mendapati terdapat keterangan mencukupi untuk meneruskan dengan kes serangan salah, tangkapan dan penahanan salah defendan ketujuh dan sewajarnya membenarkan tuntutan balas defendan ketujuh. Hakim perbicaraan oleh itu mengawardkan defendan ketujuh ganti rugi RM5,000

kerana serangan, RM6,000 kerana tangkapan dan penahanan salah dan RM10,000 ganti rugi tambahan. Ini adalah rayuan kerajaan terhadap sebahagian daripada keputusan hakim perbicaraan, iaitu keengganan untuk mengisytiharkan tanggungjawab defendan-defendan kerana melanggar kewajipan statutori di bawah s 6(2)(g) APA, penolakan tuntutan ganti rugi khas kerajaan dan keputusan untuk membenarkan tuntutan balas defendan ketujuh. Menurut kerajaan, s 6(2)(g) APA mewujudkan kewajipan berjaga-jaga statutori ke atas defendan-defendan sebagai penganjur-penganjur perhimpunan tersebut. Oleh itu, kerajaan berhujah bahawa defendan-defendan patut bertanggungjawab secara kolektif untuk semua ganti rugi yang timbul daripada pelanggaran s 6(2)(g) APA. Ia juga hujah perayu bahawa kerajaan patut dapat membuat tuntutan untuk hak-hak yang diperuntukkan dalam statut-statut termasuk APA, seperti mana-mana warganegara lain.

Diputuskan, menolak rayuan berhubung pelanggaran kewajipan berjaga-jaga oleh defendan-defendan dan membenarkan rayuan terhadap sebahagian tuntutan balas defendan ketujuh:

(1) **(oleh Rohana Yusuf HMR)** Tiada sebab untuk mengganggu penemuan yang mempunyai sebab yang baik bahawa defendan ketujuh dengan mencukupi telah membuktikan kes berhubung kesakitan dan kecederaan atas imbangan kebarangkalian. Berdasarkan fakta dan keadaan kes ini, tuntutan defendan ketujuh untuk ganti rugi tidak patut dinafikan hanya atas kegagalan untuk menamakan pelaku tort. Ia satu peghinaan kepada kesedaran awam untuk menafikan tuntutan yang disokong oleh keterangan jelas yang tidak ditandingi, seperti dalam kes ini hanya kerana pelaku tort tidak dinamakan. Ini tidak mengatakan bahawa keperluan ss 5 dan 6 APK boleh diketepikan. Walau bagaimanapun, kegagalan kerajaan untuk menimbulkan ketidakpatuhan ini dengan segera, terutamanya sebelum keterangan dikemukakan untuk mengukuhkan pengataan telah menjejaskan kedudukannya sendiri. Oleh itu, keterangan berhubung kecederaan defendan ketujuh semasa dia di bawah jagaan dan tahanan polis selepas dia ditangkap tidak boleh diabaikan (lihat perenggan 12, 16, 18–21).

(2) **(oleh Rohana Yusuf HMR)** Walaupun defendan ketujuh berhak kepada ganti rugi untuk kecederaan yang dialaminya semasa dalam tahanan polis, tangkapan dan penahanan defendan ketujuh bukan penggunaan kuasa yang menyalahi undang-undang. Polis dibenarkan di bawah Kanun Tatacara Jenayah ('KTJ') dan Akta Polis untuk menggunakan kuasa untuk menangkap dan menahan seseorang bagi tujuan mengekalkan keamanan dan ketenteraman dan fakta dan keadaan kes ini mewajarkan campur tangan polis demi menjaga keamanan dan ketenteraman. Tangkapan yang membawa kepada penahanan enam jam adalah dalam kuasa yang dilaksanakan di bawah s 23 KTJ dan tidak

menjadikan penahanan itu menyalahi undang-undang. Oleh itu perbicaraan terkhilaf dalam mendapati defendan ketujuh mempunyai kes tangkapan dan tahanan salah. Oleh demikian tuntutan balas kerana tangkapan dan tahanan yang menyalahi undang-undang tidak boleh dikekalkan. Walau bagaimanapun, hakim perbicaraan adalah betul dalam mengawardkan defendan ketujuh ganti rugi RM5,000 untuk kecederaan yang dialami oleh defendan ketujuh semasa dia dalam jagaan polis. Selanjutnya, hakim perbicaraan juga mewajarkan award ganti rugi tambahan dalam kes ini. Justeru defendan ketujuh berhak kepada ganti rugi RM5,000 kerana kesakitan dan kecederaan daripada serangan dan ganti rugi tambahan RM10,000 (lihat perenggan 22–24 & 27).

(3) **(oleh Varghese George HMR, menyokong)** Tujuan utama s 6(2)(g) APA adalah untuk memperuntukkan langkah-langkah untuk mengawal selia hak warganegara bagi menganjur dan menyertai perhimpunan secara aman. Pilihan perkataan 'ensure' dalam s 6 APA tidak menandakan bahawa menjalankan apa-apa tanggungjawab tertentu adalah tanggungjawab yang 'must' atau mengikat dari segi undang-undang dan imperatif. Jika ia adalah niat Badan Perundangan untuk mengenakan liabiliti sivil statutori atau sanksi keseksaan kerana kegagalan mematuhi tangunggjawab yang ditetapkan ke atas defendan-defendan sebagai penganjur-penganjur perhimpunan tersebut, ia diperuntukkan secara spesifik dalam APA itu sendiri oleh Badan Perundangan. Walau bagaimanapun, adalah jelas bahawa peruntukan s 6 dan khususnya s 6(2)(g) APA tidak mengenakan kewajipan atau liabiliti statutori ke atas penganjur-penganjur tersebut, dan tiada hak kausa tindakan persendirian yang timbul jikapun terdapat apa-apa pelanggaran atau kegagalan untuk mematuhi tanggungjawab itu di pihak defendan-defendan (lihat perenggan 47–48, 50 & 52).

(4) **(oleh Varghese George HMR, menyokong)** Berkenaan isu sama ada kerajaan boleh memulakan tindakan common law kerana kecuaian terhadap defendan-defendan, ia adalah jelas bahawa meskipun kausa tindakan dalam common law boleh dikekalkan oleh Kerajaan, hakim perbicaraan adalah wajar dalam penemuan bahawa berdasarkan keterangan itu ia tidak dapat disimpulkan yang peserta-peserta tulen di perhimpunan tersebut adalah mereka yang telah menyebabkan kerosakan kepada kenderaan polis tersebut. Sepertimana ditekankan oleh hakim perbicaraan ia adalah menarik bahawa polis yang mempunyai sumber teknologi yang tersedia untuk mereka tidak dapat mengenal pasti peserta atau peserta-peserta tertentu yang menyebabkan kerosakan kepada kenderaan pois tersebut, Dalam keadaan itu tiada sebab untuk campur tangan dengan penemuan hakim perbicaraan, yang mendapati defendan-defendan sebagai penganjur-penganjur perhimpunan tersebut tidak pun melanggar apa-apa kewajipan berjaga-jaga berdasarkan fakta itu (lihat perenggan 66, 68 & 70).

(5) **(oleh Mary Lim HMR, menyokong)** Kerajaan bukan seperti warganegara lain yang mana haknya untuk menyaman perlu dibaca tertakluk kepada Akta Prosiding Kerajaan 1956 ('APK') dan mana-mana undang-undang bertulis. Di bawah s 3 APK yang hendaklah dibaca tertakluk kepada s 39 APK hak Kerajaan untuk menyaman hanya timbul apabila undang-undang bertulis memperuntukkan hak spesifik berhubung tindakan. Walau bagaimanapun, penelitian APK tidak menunjukkan kewujudan hak sedemikian. Hanya dua hak yang diperuntukkan dalam APK didapati dalam ss 4 dan 5 dan itu adalah berkaitan hak untuk menganjur perhimpunan atau menyertai dalam perhimpunan dan hak-hak orang yang mempunyai kepentingan. Polis mahupun Kerajaan tidak boleh mengaitkan diri mereka dengan orang-orang tersebut kerana s 12 APK memperuntukkan bagaimana kepentingan orang-orang sedemikian dikendalikan oleh polis. Dalam ketiadaan kata-kata jelas yang bertentangan dan berdasarkan sifat hak-hak yang didapati dalam APK, ia meletakkan tekanan pada pentafsiran dan penggubalan Akta tersebut jika mahkamah ini mendapati untuk menyebelahi Kerajaan (lihat perenggan 77, 84, 86 & 89).]

Notes

For cases on duty of care, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 1381–1500.

Cases referred to

British Broadcasting Corporation v Johns (Inspector of Taxes) [1965] Ch 32, CA (refd)

Cutler v Wandsworth Stadium Ltd (in Liquidation) [1949] 1 All ER 544; [1949] AC 398, HL (refd)

Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener) [2004] 2 MLJ 257; [2004] 1 CLJ 701, FC (refd)

Dewan Undangan Negeri Kelantan v Nordin bin Salleh & Anor [1992] 1 MLJ 697, SC (refd)

Haji Abdul Rahman v Government of Malaysia & Anor [1966] 2 MLJ 174, HC (distd)

Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1, FC (distd)

Lai Seng & Co v Government of Malaysia & Ors [1973] 2 MLJ 36 (refd)

Malaysian Bar & Anor v Government of Malaysia [1987] 2 MLJ 165, SC (refd)

Sistem Televisyen Malaysia Bhd & Ors v Nurullah bt Zawawi & Anor [2015] 6 MLJ 703; [2015] 9 CLJ 357, CA (refd)

Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333, FC (refd)

Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors [2000] 4 MLJ 200, HC (refd)

Stovin v Wise (Norfolk County Council, third party) [1996] 3 All ER 801, HL (refd)
Tan Eng Siew & Anor v Dr Jagjit Singh Sidhu & Anor [2006] 1 MLJ 57; [2006] 5 CLJ 175, HC (refd)
Attorney-General v Donaldson and Others, The (1842) 10 M & W 117 (refd)
People's Insurance Co (M) Bhd v Ting Tiew Kiong, The [2007] 5 MLJ 624, CA (refd)
UEM Group Berhad (Dahulunya Dikenali Sebagai United Engineers (Malaysia) Berhad) v Genisys Integrated Engineers Pte Ltd & UEM Genisys Sdn Bhd and another appeal [2010] MLJU 2179; [2010] 9 CLJ 785, FC (refd)
X and others (minors) v Bedfordshire County Council [1995] 3 All ER 353; [1995] 2 AC 633, HL (refd)

Legislation referred to

Animals Act 1953 s 77
Arbitration Act 2005 s 3
Construction Industry Payment and Adjudication Act 2012 s 2
Criminal Procedure Code ss 23, 23(1)(a)
Crown Proceedings Act 1947 [UK] s 31,
Customs Act 1967 s 72
Federal Constitution arts 4(1), 5(1), 8(1), 9(2), 10(1), 10(1)(a), (1)(b), (1)(c), 119(1)
Government Proceedings Act 1956 ss 3, 4(d), 5, 6, 39
Local Government Act 1976 s 156
Peaceful Assembly Act 2012 ss 3, 4, 4(2), 5, 6, 6(1), (2), 6(2)(g), 7, 7(a)(v), 8, 9(5), 12, 15(3), Part III
Penal Code
Police Act 1967 ss 3, 20, 21
Rules of the High Court 1980 O 18 r 19
Securities Commission Act 1993 s 155
Street, Drainage and Building Act 1974 s 128
Town and Country Planning Act 1976 s 55

Appeal from: Civil Suit No 21NCVC-102–05 of 2012 (High Court, Kuala Lumpur)

Kamal Azira bin Hassan (Rosli bin Ahmad, Nurul Ainy bt Yahaya, Shaiful Nizam bin Shahrin and Nur Aqilah bt Ishak with him) (Senior Federal Counsel, Attorney General's Chambers) for the appellant.
Tommy Thomas (Michelle Kummar with him) (Tommy Thomas & Co) for the first respondent.
Honey Tan Lay Ean (Tan Law Practice) for the second, third and seventh respondents.
Syahredzan Johan (Melissa Sasidaran with him) (Ram Rais & Partners) for the fourth and ninth respondents.

S Ravindran (Sreenevasan Young) for the fifth respondent.
Ang Hean Leng (Hoi Jack S'ng with him) (Lee Hishamuddin Allen & Gledhill) for the sixth respondent.
Lim Jit Kiong (Nur Syakira Tajudin with him) (JK Lim) for the eighth respondent.
Firdaus Husni (Lim Tuck Sun and Kenneth Koh with him) (Chooi & Co) for the tenth to twelfth respondents.
Alvin Julian (Aarthi Jeyarajah with him) (Shearn Delamore & Co) for the thirteenth to fifteenth respondents.

Rohana Yusuf JCA (delivering judgment of the court):

THE COUNTERCLAIM

I have also read both the judgments of both my learned brother Varghese George JCA, and my learned sister Mary Lim Thiam Suan JCA and concur with both their judgments on the matters therein.

[1] I will now deal with the appeal on the counterclaim of the sixth respondent against the appellant/government which was allowed by the learned trial judge. The counterclaim of the sixth respondent (Dr Wong Chin Huat) is based on his pleaded case that, after the Bersih 3.0 assembly and the police had stopped firing tear gas, he came out of hiding. The sixth respondent said he went to pick up his car, which was parked at Jalan Tun HS Lee. He was arrested by police officers who had no identification tags on their uniform. He was then taken to an open space, which was treated and served as a detention centre located between Jalan Raja and Jalan Parlimen. The sixth respondent alleged that he was never told the reason for his arrest but was made to run the gauntlet of at least ten police officers of whom no identification was shown on their uniform. He kept asking for the reason of his arrest but was not told why. In fact he said he was threatened by the officers, instead.

[2] On these facts the learned trial judge found sufficient evidence to substantiate a case of wrongful assault, wrongful arrest and detention of the sixth respondent for at least six hours and accordingly allowed the following damages:

(a) for assault — RM5,000;

(b) for breach of fundamental rights, wrongful arrest and detention — RM6,000;

(c) aggravated damages — RM10,000.

[3] Learned SFC's appeal on this part of the order of the High Court is anchoured mainly on the failure of the sixth respondent to name the tortfeasor as required under ss 5 and 6 of the Government Proceedings Act 1956,

reinforced by s 4(d) of the same Act. Further learned SFC contended that there was no case of false arrest made out by the sixth respondent because the police was exercising their duties under s 23(1)(a) of the Criminal Procedure Code ('the CPC'). A

[4] Cited for our reference in support of the requirement to name the tortfeaser was the Government Proceedings Act and the Federal Court decision in *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1. We are mindful of the legal position as expounded by the Federal Court in that case, which had referred and accepted the decision of the High Court in *Haji Abdul Rahman v Government of Malaysia & Anor* [1966] 2 MLJ 174. In affirming the decision of the High Court on the issue of the strict requirements of ss 5 and 6 of the Government Proceedings Act 1956 ('the Government Proceedings Act'), the Federal Court held that the identity of the officer responsible for the alleged tort against the government in that case must first be ascertained or established, before the government can be made liable in a tort action. Since the tortfeasor was not named in *Lay Kee Tee* the Federal Court allowed the striking out application by the government under O 18 r 19 of the Rules of the High Court 1980, on failure to comply with the requirements of the Government Proceedings Act. B C D E

[5] For the sixth respondent it was strenuously explained that the failure in naming the relevant police officers as the torfeasors was because they cannot possibly be identified. None of them wore the identification tag usually worn by a police personnel on duty. The sixth respondent could only identify them as police officers by their uniform. The sixth respondent had also pleaded bad faith on the part of the police and alleged that such conduct was simply designed to avoid identification. F

[6] We have further examined the Federal Court's decision in propounding the legal position in relation to ss 5 and 6 of the Government Proceedings Act. In *Lay Kee Tee* the appellants, being the Government of Malaysia and the State Governments of Negeri Sembilan, Perak and Selangor had applied for a suit against them by 184 respondents who allegedly suffered from Japanese Encephalitis ('JE') Nipah virus, or the dependents of persons who died from the virus, or owners of pig farms affected by the virus, to be struck out under O 18 r 19 of the Rules of the High Court 1980, for non-compliance with ss 5 and 6 of the Government Proceedings Act. G H

[7] The striking out application in that case was allowed by the learned senior assistant registrar which was affirmed by the High Court. At the Court of Appeal the decision of the High Court was overturned and the appellant appealed to the Federal Court to determine the various legal issues, inter alia, relating to the application of ss 4, 5 and 6 of the Government Proceedings Act. I

The Federal Court agreed with the decision in *Haji Abdul Rahman* and distinguished the case of *Lai Seng & Co v Government of Malaysia & Ors* [1973] 2 MLJ 36 and answered the legal question posed in favour of the government namely, that under ss 5 and 6 it would be necessary to comply with the requirement of naming the tortfeasor before the government could be held liable in a tort action. The Federal Court also made reference to the High Court decision which discussed the need to comply with s 5 and in *Steven Phoa Cheng Loon & Ors v Highland Properties Sdn Bhd & Ors* [2000] 4 MLJ 200.

[8] While it may well be true as explained by learned counsel that the circumstances in the present appeal may pose difficulty to name the tortfeasor responsible, it must be appreciated that the rationale and wisdom behind the requirement of naming a tortfeasor is not difficult to understand. The claimant must first identify the tortfeaser and show some semblance of liability before invoking vicarious liability of the employer or the principal. The failure to name a tortfeasor may deprive the government of the possible denial or defence or the refutation of any allegation made by a claimant.

[9] We however note in particular that in both *Lay Kee Tee* as well as *Haji Abdul Rahman* the issue of non-compliance was taken at the interlocutory stage. In *Lay Kee Tee* it was an application to strike out the suit, and in *Haji Abdul Rahman* it was raised as preliminary objection to strike out the suit against the government. The court in both instances was therefore not faced with clear evidence of a tortious action being made out.

[10] Conversely, in the instant appeal the learned trial judge was faced with uncontroverted evidence of pain and injury suffered by the sixth respondent in the course of being arrested. The learned High Court judge found that the sixth respondent had supported his case by his own unwavering evidence as well as the evidence of three other witnesses DW13 (Dr Suguna Sellapan), DW17 (Jeyamuralee a/l Sukunavelu) and DW18 (ASP Rajakopal a/l Arumugam). A doctor on duty at the Emergency and Trauma Department at Hospital Kuala Lumpur prepared a written report of the sixth respondent's injury. The learned judge upon a total evaluation of evidence before him found that the case of the sixth respondent had, on the balance of probabilities, been made out.

[11] On the failure to name the tortfeasor, at para 18 (the second para 18 particularly) the learned judge observed that '... Having regard to the evidence it would be impossible for the sixth respondent to name each and every police officer involved since they were neither wearing name tags nor ID numbers. Even though the sixth respondent reserved the right to seek the right to discovery, any application for discovery would be an exercise in futility because the plaintiff by virtue of their pleaded defence to the sixth respondent's counterclaim have denied that the sixth respondent was ever assaulted and that

by itself would defeat discovery'. The learned High Court judge further states in his grounds of judgment that the case of *Lay Kee Tee*, which followed the decision of the High Court in *Haji Abdul Rahman* can be distinguished on their facts though unfortunately His Lordship did not explain how they were distinguishable.

[12] Having perused the grounds of judgment of the learned trial judge, firstly we have no reason to disagree or to disturb the well-reasoned findings of His Lordship that the sixth respondent had sufficiently established a case of pain and injury on a balance of probabilities. Medical evidence of the witnesses for the sixth respondent showed injury had been inflicted on the sixth respondent. There were evidence also to show that the injury took place after the arrest when the sixth respondent was under the care and control of the police ('PDRM'). On the other hand, there was no evidence offered to refute these testimonies on behalf of the government at the trial. Therefore the injury of the sixth respondent as a matter of fact had been clearly established.

[13] We have very carefully examined the substance of the pleaded defence on behalf of the government in its reply to the counterclaim of the sixth respondent. There was a mere denial of any knowledge on the allegation of assault and injury suffered by the sixth respondent at para 16 of the reply to the counterclaim. The pleaded defence of the government was a bare denial. The narration by the sixth respondent of how he was arrested as well as how the infliction of injuries on him occurred was unchallenged.

[14] The sixth respondent had also pleaded that he was unable to ascertain the identity of the relevant police officers for the purpose of commencing proceedings against the relevant police officers as stated in para 6(i) of his claim. Responding to this specific pleading again was also bare denial (see para 17 of the reply).

[15] It is interesting however to note that there was an admission on behalf of the government at para 17 of the reply that the sixth respondent was transferred to PULAPOL by bus together with another 22 persons, which in essence shows a clear case of arrest of the sixth respondent. This is further reinforced by the submission of learned SFC that the arrest was a lawful exercise of police powers under the law. At para 25 of its reply, while denying the allegation of breach of duties by the police to maintain peace and order it was averred that, '(b) Pihak polis hanya menggunakan kekerasan secara munasabah sebagai langkah terakhir apabila peserta perhimpunan tersebut mula merempuh halangan dan sekatan tersebut dan bertindak ganas'.

[16] The evidence of injury of the sixth respondent while he was under police custody cannot be ignored by the court. As we have earlier alluded to, in

contrast to this case, in *Lay Kee Tee* the court was not faced with clear evidence of a tortious act since the case was not heard on its merits. There it was a striking out application for failure to name the responsible officer of the various governments. Similarly in *Haji Abdul Rahman* the issue of non-compliance with the Government Proceedings Ordinance was raised as a preliminary objection. The High Court had allowed the preliminary objection on the reasons of non-compliance.

[17] Learned SFC in this appeal had neither applied to strike out the counterclaim of the sixth respondent under O 18 r 19, nor raised any preliminary objection on this point of non-compliance. Instead, the case was allowed to proceed to a full trial wherein unchallenged evidence clearly established the allegation of injury as well as the damage suffered by the sixth respondent, in the course of his arrest. In the circumstances, in our view it was too late in the day for the non-compliance issue to be raised. The SFC had forgone the opportunity to the raise issue of non-compliance when it proceeded to file the reply to the counterclaim, and to simply deny all the allegations made against the government.

[18] It is said that the reason why a tortfeassor is to be named is because it will cause prejudice to the government as an employer to defend its case. The government in this case had filed its defence and denied any knowledge of injury to the respondent. The sixth respondent however managed to establish a case against the government on a balance of probabilities that he indeed suffered injury in the care and custody of the police after he was arrested. How could the government be allowed at a later stage to succeed in its defence of non-compliance in the face of clear evidence, which was not refuted. In the circumstances it is clear that the government was not in any way prejudiced by the non-compliance in this case since it had filed its reply to the counterclaim albeit a mere denial that such act did not occur. Having allowed the case to proceed and having allowed uncontested evidence to be adduced it would not be fair to allow it to revert to the issue of non-compliance.

[19] For all the above reasons and on the facts and circumstances of this case the claim of the sixth respondent for damages should not be denied purely on the failure to name the tortfeasor. It would be an affront to public conscience to deny a claim supported by clear uncontested evidence, as is in this case simply because the tortfeasor cannot be named. Even the allegation that the police officers did not wear name tags to hide their identity was not answered or explained.

[20] Lest we be misunderstood, in arriving at the decision that we did we are not saying that the requirements of ss 5 and 6 of the Government Proceedings Act can be dispensed with even on the ground that it is impossible to name

them as stated by the respondent in this case. There are rules and procedures available to litigants to obtain or elicit the necessary information. The failure of the appellant/government to raise this non-compliance promptly especially before the evidence was adduced to substantiate the allegation had compromised its own position. This would have brought difficulties to its own case especially, when in the circumstances it had little option but to deny the allegation of the tortious act. Eventually this had left the court with uncontroverted evidence to deal with.

[21] We agree with the learned trial judge therefore that the case of the sixth respondent had been made out, save the allegation of false arrest and false detention which we will deal with in the following paragraphs.

DAMAGES

[22] We now come to the issue on damages. The learned judge had allowed damages for assault, beatings and injuries, unlawful arrest and detention as well as aggravated damages.

[23] We agree with the submission of the learned SFC that the arrest and detention of the sixth respondent was not an unlawful exercise of power. The police is authorised under the CPC and the Police Act 1967 to exercise the power to arrest and detain a person for the purpose of preserving peace and tranquillity. On evidence, it is clear that the situation and scenario after the assembly was told to disperse, became rather chaotic. A small group of unidentified persons breached the barbed-wire barricade placed by the authorities at the Jalan Tun Perak and Jalan Raja junction which led the police to fire water cannons and teargas towards the crowd. Even from the respondent's own account too, we agree with the submission of learned SFC that the intervention of the police for keeping peace and tranquillity was needed.

[24] The police have the necessary power and authority and was exercising a lawful authority under the law. The facts and circumstances obviously warranted police interference with a view of preserving peace and order. Such power includes the right to arrest. The arrest led to the detention of the sixth respondent for six hours altogether. The six hours detention is within the authority exercised under s 23 of the CPC and cannot render the detention unlawful. The learned trial judge had fallen into error in failing to take into account of this legal position. For these reasons we agree with the learned SFC that the learned trial judge had erred in his finding that the sixth respondent had made out a case of wrongful arrest and wrongful detention. In our view the counterclaim of the sixth respondent for unlawful arrest and unlawful

detention cannot be sustained. This is a matter requiring our appellate intervention.

[25] Having said that, we are mindful that the power of arrest does not transcend to causing any bodily injury on any person. On evidence before the learned trial judge there were pain and injury suffered by the sixth respondent. The medical evidence of the witnesses for the sixth respondent shows injury had been inflicted on the sixth respondent which took place after the arrest, when the sixth respondent was under the care and control of the PDRM. The learned judge had allowed damages of RM5000, which we agree and we have no reason to intervene. We therefore affirm the decision and the order of the learned judge of this part.

[26] On the aggravated damages, we are mindful that the award of aggravated damages was made at the discretion of the learned trial judge. Aggravated damages differs from exemplary damages as it is still compensatory in nature (see *Sistem Televisyen Malaysia Bhd & Ors v Nurullah bt Zawawi & Anor* [2015] 6 MLJ 703; [2015] 9 CLJ 357). It is usually granted when there is evidence of high-handed, oppressive, insulting or contumelious behaviour by a defendant which increases the mental pain and suffering caused to a plaintiff. The learned trial judge had justified the award of aggravated damages in this case on the basis that the sixth respondent was subjected to cruel and inhumane beatings and assault based on the evidence before the court. We have no reason to disturb the findings which the learned trial judge had made on such good reason. The learned judge had not erred in the principle of assessment of the aggravated damages. We therefore affirm this part of the order.

[27] In conclusion we affirm the decision of the learned trial judge which dismissed the claim by the government. We dismiss the appeal of the government on the same. On the government's appeal against the decision on counterclaim of the sixth respondent, we allow the appeal of the government in part and we make the following orders on the counterclaim of the sixth respondent:

(a) we affirm the order of the High Court for damages of RM5,000 for pain and injury from the assault;

(b) we affirm the order of the High Court for aggravated damages of RM10,000; and

(c) we allow the appeal on the wrongful arrest and wrongful detention and set aside this part of the order by the High Court.

We make no order as to costs.

Varghese George JCA (delivering supporting judgment of the court):

INTRODUCTION

[28] This was one of two appeals emanating from the several decisions made by the learned trial judge in Kuala Lumpur High Court Civil Suit No 21NCC-102–05 of 2012. The suit in question had been filed by Kerajaan Malaysia ('the government') against 15 defendants in their capacity as organisers of the 'Bersih 3.0 Assembly' ('the assembly') held on 28 April 2012 in the surroundings of Dataran Merdeka. The objective of the assembly was to call for clean and fair elections.

[29] It was alleged that the assembly had not been carried out in a peaceful manner and the participants had caused damage to property belonging to the government, namely, damages to some 16 vehicles belonging to the police. The monetary claim of the government was for special damages in the sum of RM110,543.27 and for interest and costs.

[30] In the suit the government sought firstly for a declaration that the defendants had breached, what was contended to be, their statutory duty and/or obligations under s 6(2)(g) of the Peaceful Assembly Act 2012 ('the PAA') to ensure that the assembly would not endanger health or cause damage to property or the environment. Alternatively, it was pleaded that the defendants were negligent, that is, in breach of their common law duty and/or were vicariously liable for the damages sustained by the government.

[31] The first defendant had brought a counterclaim in the suit seeking a declaration that s 6(2)(g) of the PAA was unconstitutional for being contrary to and inconsistent with arts 5(1), 8(1), 9(2), 10(1)(a), (b) and (c) and 119(1) of the Federal Constitution and therefore by virtue of arts 4(1), that s 6(2)(g) was rendered void.

[32] The seventh defendant (now the sixth respondent before us) in his separate counterclaim also filed in the suit, in addition to his contention that s 6(2)(g) of the PAA was ultra vires the Federal Constitution, alleged further that he had been wrongfully arrested/detained and beaten by the police while in custody. He claimed that he had suffered injuries and sought to be awarded general damages for breach of his constitutional rights and the unlawful detention he had been subjected to. Aggravated damages was also prayed for in the circumstances of the wrongful conduct of the police against him during the period of detention.

[33] The other appeal that arose from the decision in the government's suit was Appeal No W-01(NCVC)(W)-69–03 of 2015 by the first defendant

against the dismissal of her counterclaim which sought for a declaration that the PAA was unconstitutional, alternatively, s 6 of the PAA was unconstitutional. This appeal had been stood down originally but when we called up the same for further clarification from the parties on 8 August 2016, we were informed by counsel for the first defendant that his instruction was to withdraw that appeal. Accordingly, Appeal No W-01(NCVC)(W)-69–03 of 2015 was struck out.

JUDGMENT OF THE HIGH COURT

[34] There were two separate grounds of judgment issued by the learned trial judge namely:

(a) in respect of the government's claims and the first defendant's counterclaim on the issue of the constitutionally of s 6(2)(g) PAA; and

(b) in respect of the seventh defendant's counterclaim for wrongful detention and damages for assault and injuries suffered.

[35] The key aspects of the learned trial judge's decisions were as follows:

(a) the imposition of responsibility on the organisers under s 6(2)(g) to ensure that the assembly would not endanger health or cause damage to property or environment did not amount to a deprivation of personal liberty as provided for under art 5(1) of the Federal Constitution, as it neither renders the right to personal liberty ineffective or illusory (*Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333; *Dewan Undangan Negeri Kelantan v Nordin bin Salleh & Anor* [1992] 1 MLJ 697);

(b) since all organisers of assemblies were required to ensure that no damage to property was caused, namely, that they were being treated in like manner, s 6(2)(g) of the PAA met the reasonable or permissible classification test, (the essential ingredient of the equal protection doctrine) and accordingly s 6(2)(g) of the PAA was not afoul of the art 8(1) — guarantee under the Federal Constitution ('*Sivarasa*'); *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257; [2004] 1 CLJ 701; *Malaysian Bar & Anor v Government of Malaysia* [1987] 2 MLJ 165);

(c) s 6(2)(g) of the PAA did not in any manner restrict upon the citizen's right to move freely (art 9(2)) and neither did that provision impinge upon the right to freedom of speech (art 10(1)) enshrined in the Federal Constitution;

(d) similarly s 6(2)(g)) of the PAA did not take away the right to assemble peacefully without arms and PAA was basically to enhance such a right and to regulate the same. In any event the obligations imposed were not

disproportionate to what was provided for in art 10(1)(b) and the imposition of certain responsibilities on them as organisers did not affect the defendant's rights as ordinary citizens;

(e) on the facts, Bersih had arranged for approximately 4,000 *Unit Amal* (security personnel), as confirmed by video clips, and over 2,000 volunteers and 500 medical personnel, for the smooth flow of the assembly;

(f) the first defendant had publicly announced at about 2.40pm that the assembly had been a success and it was being concluded. Participants were told at that point by the organisers to disperse and they had commenced to do so. There was no untoward incident up to that point;

(g) it was thereafter that a small group of unidentified persons breached the barbed-wire barricades placed at the Jalan Tun Perak and Jalan Raja junction by the authorities. The police responded with water cannons and the firing of teargas canisters towards the crowd to disperse the participants;

(h) the disturbance (which led to the damage of the police vehicles) were not caused by true and genuine participants' of the assembly. The organisers had all along extolled all participants to behave responsibly and peacefully while at the assembly;

(i) the defendants were not in breach of their common law duty of care and the government's claim in negligence had not been proved on a balance of probabilities;

(j) the court was not satisfied on evidence that the damage claimed was caused 'not by independent agents' but by legitimate participants at the assembly;

(k) vicarious liability did not in any case attach to the organisers as it was not established that there was a special relationship between the organisers and those who caused the damages to the vehicles (*Tan Eng Siew & Anor v Dr Jagjit Singh Sidhu & Anor* [2006] 1 MLJ 57; [2006] 5 CLJ 175);

(l) there was also the issue of the acts and omission of the police that invariably had also contributed to and resulted in the damages to the vehicles, for which the government was now pursuing a claim;

(m) in any event s 7(a)(v) of the PAA stated that a *participant* shall refrain from causing damage to property and the government ought to have utilised that provision to properly identify and bring action against the actual perpetrators of the alleged damages to the vehicles;

(n) upon the unbroken and unshaken testimony in court of the seventh defendant, which was corroborated on material particulars by the evidence of DW17, DW18 and the medical evidence of DW13, the

court was satisfied upon a balance of probabilities that the seventh defendant had proved his claim that he had been wrongfully arrested and subjected to assault and beating before he was subsequently released;

(o) the government's contention that the seventh defendant had failed to name the tortfeasor or tortfeasors in the action, as required by ss 5 and 6 of the Government Proceedings Act 1956, was untenable in the particular situation at hand, as it was impossible for the seventh defendant to name each and every police officer involved since they were neither wearing name-tags nor ID numbers. Any application for discovery (of names and particulars of such police officers involved) would have been an exercise in futility since the position taken by the government in defence (to the counterclaim) was an outright denial that there had been any such assault during detention as alleged by the seventh defendant;

(p) there was sufficient evidence for the court to conclude that the seventh defendant had been assaulted while being detained by unidentified and unnamed 'police officers' and the government as the employer was vicariously liable for the tortious of the government servants concerned. The court awarded a sum of *RM5,000* for the assault, beatings and injuries suffered by the seventh defendant;

(q) the government was liable to the seventh defendant in general damages for breach of his constitutional rights arising from his unlawful arrest and detention. The seventh defendant had been unlawfully deprived of his liberty and a sum of *RM6,000* was awarded as general damages;

(r) this was a fit case to award 'aggravated damages' as well considering the conduct of the police and taking into consideration the reputation, standing and public contributions of the seventh defendant. The aggravated damages awarded to the seventh defendant was assessed at *RM10,000*; and

(s) the seventh defendant was awarded costs of RM30,000 for his successful counterclaim. No order for costs was made however on the dismissal of the government's principal suit and also the dismissal of the first defendant's counterclaim.

THE APPEAL

[36] The instant appeal by the government was only against *part* of the decisions of the learned trial judge. They were restricted to:

(a) the refusal of the learned trial judge to declare that the organisers ('the defendants') were liable for damages for breach of a statutory duty under s 6(2)(g) PAA;

(b) the dismissal of the government's claim for special damages of RM110,543.27;

(c) the court's decision to allow the seventh defendant's counterclaim and the following awards made in favour of the seventh defendant:

(i) damages for assault in the sum of RM5000;

(ii) damages for breach of fundamental rights, wrongful arrest and detention in the sum of RM6,000;

(iii) aggravated damages in the sum of RM10,000; and

(iv) costs of RM30,000.

OUR DELIBERATION AND DECISION

[37] Having heard respective counsel for the parties, we were of the view that the issues that arose for our determination would be best dealt with under the following three broad questions. They were:

(a) whether the *statutory obligations* spelt out in s 6(2)(g) of the PAA on the organisers of an assembly (to ensure that no damages to property or environment was caused) could in itself separately ground a private right of action by the government against the organisers (as a collective body) to recover any damages that had been caused;

(b) whether the learned trial judge erred in holding firstly, that the government's claim was only maintainable as *an ordinary tortious action* in common law and secondly, that on the evidence before the court, the government had succeeded in making out a case in *negligence* against the organisers or against any one of them;

(c) whether the learned trial judge was in error either on the facts or in law in allowing the seventh defendant's counterclaim and ordering general and aggravated damages to the seventh defendant as was done in this case.

STATUTORY LIABILITY

Whether a sustainable cause of action existed against the organisers collectively

[38] It was the submission of the learned senior federal counsel ('SFC') for the government that although the PAA was introduced to enhance the constitutional rights of citizens to organise and participate in assemblies peaceably, yet the provisions of the statute also sought to regulate and co-ordinate the exercise of those rights in the larger interest of public order. The preamble to the statute itself, it was argued, recognised that the exercise of those rights to organise and participate in peaceful assemblies had to be balanced with the protection of the rights, interest and freedom of other persons.

[39] The '*rights and freedom of other persons*' had been defined in s 3 of the PAA to include:

(a) the right to peaceful enjoyment of one's possession;

(b) the right to freedom of movement;

(c) the right to enjoy the natural environment; and

(d) the right to carry on business.

[40] Given that context where countervailing interest had also to be respected and, considering further the mandatory terms in which ss 6(1) and (2) of the PAA were couched, it was argued that it was the intention of the Legislature to impose upon organisers of assemblies a statutory liability to make good any damage or expense occasioned by a breach or non-compliance with those obligations and responsibilities.

Sections 6(1) and (2) of the PAA in so far as was material for our consideration are reproduced here:

6 Responsibilities of organisers

(1) An organiser shall ensure that an assembly is in compliance with this Act and any other written law.

(2) For the purpose of subsection (1), the organiser shall —

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) appoint such number of persons as he thinks necessary to be in charge of the orderly conduct of the assembly;

(g) ...

(h) ensure that the assembly will not endanger health or cause damage to property or the environment;

(i) ...

(j) ...

(k) ...

[41] It was also the contention of the learned SFC that the government fell within the category of '*other persons*' and accordingly were entitled to recover

from the organisers directly the costs incurred, to repair the police vehicles, all of which belonged to the government.

[42] The learned SFC however readily conceded that there was no specific statutory provision in the PAA enabling such recovery of damages by the government or, for that matter, by any person affected by a breach or non-compliance with the provision of s 6 of the PAA. Nevertheless, it was submitted that there was sufficient authority for the court to hold that a right to compensation could be inferred for breach of a statutory duty even where the statute in question was silent on such remedy or recourse.

[43] The extracts from decided cases relied upon by the government in this regard were as follows:

(a) Lord Hoffman's speech in the House of Lords case of *Stovin v Wise (Norfolk County Council, third party)* [1996] 3 All ER 801 in the following terms:

> Whether a statutory duty gives rise to a private cause of action is a question of construction ... It requires an examination of the policy of the statute to decide whether it was intended to confer a right to compensation for breach. Whether it can be relied upon to support the existence of a common law duty of care is not exactly a question of construction, because the cause of action does not arise out of the statute itself. But the policy of the statute is nevertheless a crucial factor in the decision ...

(b) Lord Browne-Wilkinson in *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353; [1995] 2 AC 633 as follows:

> ... if the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer.

(c) the following statement of the House of Lords in *Cutler v Wandsworth Stadium Ltd (in Liquidation)* [1949] 1 All ER 544; [1949] AC 398:

> For instance, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be put a pious aspiration.

[44] Although it was not explicitly put forward in so many words, the thrust of the learned SFC's submission, as it appeared to us, was that the organisers ought to be held *collectively liable* for all the damages that flowed from a breach of s 6(2)(g) of the PAA. The submission of the SFC also did not make it clear whether what was being advocated was a *'strict liability' (absolute liability)* situation in law, namely, where other evidentiary requirements like proof of

causation and further issues such as 'remoteness of damages' and such like considerations, were not material to succeed in a civil claim founded upon that strict liability requirement.

[45] The position generally taken by the defendants, on the other hand, was that the PAA was silent as to any sanction or recourses available should there be a dereliction of the obligations or responsibilities required of the organisers under s 6 of the PAA. It was submitted that if indeed it was the intention of Parliament to impose some manner of statutory liability on the organisers for non-compliance with or for disregard of the responsibilities under that section, this would have been specifically spelt out in the Act. It was not for the courts to read into that provision any liability or relief, be it penal or civil, against the organisers of an assembly, unless it was expressly provided for in the legislation itself.

[46] It was also contended that the government, or for that matter the police as a body, could not have been reasonably contemplated to fall within the category of 'other persons' whose rights and freedom had to be protected during the event of any assembly. Citing ss 3, 20 and 21 of the Police Act 1967, it was argued that there existed a positive duty on the part of police to take appropriate measures deemed necessary or expedient to ensure the orderly conduct of the assembly. It could not have been therefore within the objectives of the Act that the police force itself would qualify as amongst the 'other persons' whose rights, freedom and interest had to be protected during the happening of the assembly, unless of course they were specifically named to be entitled to such relief.

[47] *In our assessment*, the answer to the question whether the 'responsibilities' on the organisers enumerated in s 6(2) of the PAA ('the Act') constituted by itself, or were of such nature as creating a *statutory liability,* was very much dependent on the primary objectives of the legislation and a reasonable reading of the said provisions. There was no doubt that the primary objectives of this specific statute was to provide for measures to regulate the citizen's right to organise and participate in peaceful assemblies.

[48] It would also be noted that Part III of the Act (Responsibilities of Organisers, Participants and the Police) apportioned the responsibilities for the conduct of a peaceful assembly as amongst the *organisers* (s 6), the *participants* (s 7) (and *the police force* s 8). It was clear therefore that the responsibilities to be undertaken by the respective identified groups were meant to be incidental obligations to meet the objectives of ensuring a peaceful assembly. The choice of the word 'ensure' itself in s 6 did not connote that the carrying out of any of the particular responsibility was a 'must' or a legally binding and imperative

obligation; it was more a statement indicating a preference or setting out some kind of guidelines.

[49] We could not therefore agree that such a recitation of responsibilities in itself amounted to a creation of a statutory duty, a violation or omission of which, would necessarily import a statutory liability, as was argued here by the learned SFC.

[50] We were more in agreement with the submission of counsel of the defendants *that if it was* the intention of the Legislature to impose a *statutory civil liability* or some penal sanction for failure to comply with the assigned responsibilities on the organisers, this would have been specifically provided for within the Act itself by the Legislature.

[51] In passing we would also need to point out that the underlying facts in those cases from which the learned SFC had cited excerpts to canvas that a private right of action ought to be implied (ie from the words employed in s 6 of the PAA) actually involved suits brought by individuals against statutory bodies or public authorities for acts or omission under their respective statutorily spelt out objectives and functions. The proceedings in *Stovin* and *X (minors)* were brought by individuals (rate payers) against County Councils and in the *Cutler* case it was an action against a stadium authority operating a facility for the public. The principles therein stated, and attempted to be relied upon to equally apply here, were in our view, not of assistance to the government's contention.

[52] It was clear to us therefore that the provision of s 6 and in particular s 6(2)(g) of the PAA did not impose a *statutory duty or liability* on the organisers and no right of a private cause of action arose even if there was any violation or some failure to abide with the responsibilities on the part of the organisers therein stated.

[53] It might well be that the learned trial judge did not specifically address this contention of the government as to whether there existed a statutory duty and consequential statutory liability, in detail or with sufficient analysis in his grounds of judgment. On our part however, having considered this question further, we found no merits in the submissions of the learned SFC on this issue.

[54] My learned sister Mary Lim JCA in her separate written judgment analyses the next question that arises in this appeal, namely, whether the government did, alternatively, even have a common law right to bring this claim as a tortious action in negligence.

A CASE IN NEGLIGENCE

[55] The learned trial judge however proceeded to consider the government's claim for damage caused to the police vehicles (the ultimate ownership of which was with the government no doubt), on the basis of a *common law tortious claim* in negligence. The conclusions reached at the end of the trial after hearing witnesses adduced by the respective parties, was adequately summed up in the following excerpts from the grounds of judgment:

> 42. In regard to the plaintiff's claim that the defendants were negligent in that they were in breach of their common law duty of care, this court finds this claim not to have been proved on a balance of probabilities. This court finds that the defendants as organisers of the assembly took adequate and satisfactory steps to ensure that the assembly proceeded smoothly in an orderly manner by arranging for approximately 4,000 Unit Amal personnel and 2,000 other volunteers and some 500 medical personnel. The disturbance only occurred after the first defendant had made the announcement that the assembly had concluded, and the participants began to disperse.

and further:

> 45. Its is clear to this court that the damage that occurred only happened after the first defendant had called off the rally. Moreover it was not shown to the satisfaction of the court that the damage that occurred was actually caused by the legitimate participants of the rally and not by independent agents. Vicarious liability does not attach to the organisers based upon the facts and evidence in this case. There can be no special relationship between the organisers and those persona who cause the disturbance which occasioned the resultant damage for it is highly unlikely that genuine participants of a peaceful assembly would resort to such violent acts as depicted in the video clips.

[56] Traditionally, a court adjudicating a claim brought for negligence would embark upon an assessment of the evidence to determine three essential ingredients. All three would have to be satisfied before any such claim could succeed. They were:

(a) whether the defendant(s) owed a duty of care to the plaintiff (claimant) in the first place;

(b) whether there had been a breach of that duty of care owed; and

(c) whether such breach had resulted in damages, which in any event ought not be remote but foreseeable.

[57] It has been generally accepted in law now that 'foreseeability' also dictated the nature and extent of the duty of care owed in any given fact situation. In other words a duty of care would arise where one's actions or omissions were likely to injure another who was within reasonable contemplation to be affected by such acts or omissions. Similarly foreseeability

was a material factor to be applied to determine also the extent of damages to be allowed, if at all a duty of care had been found to have been breached.

[58] In this appeal before us, the learned trial judge had the distinct advantage of hearing and assessing the witnesses adduced by the respective parties before His Lordship went on to make those material findings of fact enumerated earlier in his judgment. It is significant to note that the findings of the court were not based merely on the verbal testimony of witnesses but the learned trial judge had the further benefit of viewing *video clips* (taken contemporaneously) with regard to the overall conduct of the assembly by the organisers, as well as of the specific incident(s) which had resulted in the damage to the police vehicle, the subject of the government's claim.

[59] *In our assessment*, damage to vehicles, including police vehicles, or to other public or private property in the vicinity of where an assembly was convened, likely to be caused by the actions of participants was a foreseeable possibility. To that extent even if the government could bring a common law action in negligence, the organisers owed a duty of care to take needful steps and measures to prevent such an eventuality. The learned trial judge, in our reading of the judgment, clearly accepted this position that a duty of care did arise in the circumstance of this case before he proceeded to consider whether there had been any breach of that duty by the organisers.

[60] The learned SFC for the government in submissions before us laid stress on the following as evidencing clear breaches on the part of the organisers in discharging their duty of care to ensure a smooth and controlled assembly:

(a) that there were insufficient members of Unit Amal or volunteers placed at the six meeting points and overall at the various places where the participants of the assembly had gathered;

(b) that there was serious conflict of evidence as between witnesses for the defendants as to whether there indeed was a 'Field Commander' appointed for the assembly;

(c) that the organisers had not discussed amongst themselves prior to the assembly or put in place any alternative back-up plan to handle a chaotic situation that might ensue during the assembly;

(d) that there was no effective communication measures arranged for; communication merely by hand-phones were insufficient to pass orders down the line or for messages to be transmitted to the participants;

(e) that members of the organising committee admittedly never 'intensely' discussed at their meetings proper measures to handle eventualities that were likely to arise.

[61] It was also argued for the government that the participants at the assembly were the proximate cause of the damage to the police vehicles and the organisers had to bear personal liability as they convened the assembly and had invited the public to attend the same.

[62] The question then was whether adequate safeguards had been put in place to reasonably prevent or avert any breach of that duty of care resulting in damage to property occurring. The submission of the learned SFC appear to be that if there was more personnel, a 'Field Commander', better communication links and/or some alternative back-up plan arranged for, the organisers would have been able to deal with the unruly situation that had broken out. Failure to do so, it was argued, amounted to a breach of the duty of care.

[63] It was also submitted for the government that the learned trial judge was not entitled to draw a distinction between genuine and non-genuine participants and there was, in any case, no material to support that finding of different category of participants as made by the learned trial judge. In any event, it was argued, the court ought to have held that the immediate 'causation' of the damage was those present at the assembly and the organisers had to be responsible for their conduct in all events.

[64] The contentions of the learned SFC as summarised in para 33 above, in our considered view, were nothing more than merely post-facto suggestions that could be made by anyone who was 'wiser after the event' in retrospect. We were not convinced that any such additional complement of personnel or measures would have had any material effect to forestall or to deter what had actually transpired. The learned trial judge was satisfied as a matter of fact that there were sufficient number of Unit Amal members and other volunteers on site to prevent any chaotic situation arising.

[65] Given that the police with all their resources at their command could not prevent the damage, it was unreasonable to expect that more security personnel or better communication on the part of the organisers would have averted the damage to the police vehicles. It was a specific finding of fact too, not seriously challenged by the government, that the incidents which led to the damage to the police vehicles had occurred after the assembly had been officially declared to have been concluded.

[66] We have also reviewed the material that was before the court. Even if a cause of action in common law was maintainable by the government, we were not persuaded that the learned trial judge had misappreciated the evidence or misdirected his mind to the relevant issue(s) at hand, namely whether the organisers had taken adequate steps to prevent damage to property. The learned trial judge had sufficient material and was justified to say that on the evidence

before him it could not with certainty be concluded that the genuine participants at the assembly were the ones who had caused the damage to the police vehicles. That some others could have been responsible for the breach of the barricades, causing the police to take retaliatory actions, was not a farfetched theory but a real possibility. The learned trial judge was in our view in the best position to determine those questions after hearing and seeing the witnesses called by the respective parties and having viewed the video clips available.

[67] It was also intriguing to us (as was also noted by the learned trial judge), why the police with all the technological means at their disposal could not more definitely identify the particular participant or participants who caused the damage to the police vehicles and bring a claim against such persons, rather than take this broad and vague sweep against the organisers.

[68] Even assuming that the government could maintain a common law action in negligence, we nevertheless found no reason to interfere with the findings of the learned trial judge that a breach of the duty of care on the part of the defendants as organisers of the assembly had not been proved on a balance of probabilities. In *The People's Insurance Co (M) Bhd v Ting Tiew Kiong* [2007] 5 MLJ 624, it was postulated as follows:

> The settled principle of law is that, it is undesirable that the factual findings of the trial court be disturbed by the appellate court unless it appears that these findings are clearly wrong. And it is even more undesirable to do so when the conclusion reached, to a large extent, depended on the credibility of the witnesses and the impression formed by the trial judge who has seen them and judged their honesty and accuracy (see Federal Court case of *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163). We adopt the same principle in deciding this appeal.

[69] And further the Federal Court in *UEM Group Berhad (Dahulunya Dikenali Sebagai United Engineers (Malaysia) Berhad) v Genisys Integrated Engineers Pte Ltd & UEM Genisys Sdn Bhd and another appeal* [2010] MLJU 2179; [2010] 9 CLJ 785 had in similar vein observed:

> It was well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. *A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence.*

[70] We were therefore constrained to dismiss that part of the government's appeal which wanted this court to intervene and hold that a breach of duty of care by the organisers had been made out even in common law tort. The findings and decision of the learned trial judge that the organisers of the

assembly had not breached any such duty of care on the facts and particular circumstances of this case was, in any event, correct and unassailable.

[71] As regards the government's appeal against the findings and orders of the learned trial judge on the counterclaim of the seventh defendant (sixth respondent) my learned sister Rohana Yusuf JCA, has dealt with the same in her separate judgment in this appeal.

[72] I have read the judgments of sister Mary Lim JCA and sister Rohana Yusuf JCA in draft and concur with the matters therein discussed and ordered.

Mary Lim JCA (delivering supporting judgment of the court):

SUPPORTING JUDGMENT

[73] I have read the judgments in draft of my learned sister Rohana Yusuf JCA and my learned brother Varghese George JCA and I agree in the main with their reasons and conclusions. I do however, feel it necessary to add to the reasons given on the issue of s 6(2)(g) by way of a supporting judgment.

[74] The facts of the case have been well stated by my learned brother Varghese George JCA in his judgment and I adopt them here to avoid repetition.

[75] There is a further reason why learned SFC's argument on s 6(2)(g) is untenable. He argues that s 6(2)(g) creates a statutory duty of care on the organisers to ensure that any assembly it organises 'will not endanger health or cause damage to property or the environment' a breach of which may be inferred a right of civil action to the persons damnified by the breach even if no remedy is prescribed. Learned SFC relied on the view expressed by the House of Lords in *Cutler v Wandsworth Stadium Ltd (in Liquidation)* [1949] 1 All ER 544; [1949] AC 398. He claims that if it were otherwise, the Act would be 'meaningless' and of 'pious aspiration'. Learned SFC further submits that the position is the same where the affected party is the government; that the government, just like any other ordinary citizen, must have a right to sue under the law of torts for any loss or damage sustained as a result of such breach.

[76] From learned SFC's argument, the government must be able to have recourse to the rights provided in statutes including the PAA, just like any other citizen.

[77] With respect, we must disagree. The government is not like any other citizen and it never can be. In order to appreciate this, one needs to examine learned SFC's arguments against one of the most fundamental tenets of

statutory interpretation and it is that concerning the doctrine of Crown immunity.

[78] It is a well-established rule of statutory interpretation that the Crown is generally speaking, not included in legislations unless the Crown is specifically named or it is clearly intended by express or clear words found in the particular statute that the statute also binds the Crown. Statutes, generally do not bind the Crown. The reason being that the statute or the law is made by the Crown with the assent of the Lords and Commons and it is made for the subjects, and not for the Crown. This was espoused by Alderson B in *The Attorney-General v Donaldson and Others* (1842) 10 M & W 117 at p 123; and by Lord Diplock in *British Broadcasting Corporation v Johns (Inspector of Taxes)* [1965] Ch 32 at p 78. The Crown may, however, take advantage of a statute if it chooses to do so. This is also inherent in that doctrine and this principle is now found in s 31 of the Crown Proceedings Act 1947 of the United Kingdom. Section 31 is intended to provide for where the Crown, the Queen for that matter, is desirous of performing some act in her natural capacity, and not in the Crown's public or royal capacity. Where that happens, the Crown may still rely on the relevant written law although the Crown is not mentioned in that written law.

[79] Discussions on this doctrine can be found in *Craies on Statute Law* (7th Ed, Chapter 17) and in *Bennion on Statutory Interpretation — A Code* (5th Ed, s 34, pp 206–212).

[80] This basic doctrine similarly underlies the enactment of legislations in this country. Laws are enacted by the legislative arm of the government, Parliament, and the government is not included in the laws enacted unless the contrary intention appears. Some of the laws enacted require regulation, control, supervision and management. These tasks would fall on the government, be it federal or state, or even on the local authority or some statutory body specifically created for that purpose. A thumb through the hundreds of Acts of Parliament passed since independence will readily yield evidence to this effect.

[81] As is the case in the United Kingdom, the government here may, however, take advantage of a statute, if it chooses to do so. This is apparent from s 3 of the Government Proceedings Act 1956 ('Act 359'), an Act described by its long title to be:

> An Act relating to proceedings by and against the Federal Government and the governments of the States.

[82] As submitted by learned SFC, the government's right to sue is found in s 3 which reads as follow:

A Right of the government to sue

3 Subject to this Act and of any written law where the government has a claim against any person which would, if such claim had arisen between subject and subject, afford ground for civil proceedings, the claim may be enforced by proceedings taken by or on behalf of the government for that purpose in accordance with this Act.

B

[83] As provided by s 3, the right of the government to sue is read subject to Act 359 itself and to any written law and the enforcement of the proceedings taken must be in accordance with Act 359. Section 3 must be read subject to s 39, which follows closely s 31 of the then Crown Proceedings Act 1947 of the United Kingdom:

C

Application to the government of certain statutory provisions

D 39 This Act shall not prejudice the right of the government to take advantage of any written law although not named therein; and in any civil proceedings against the government any written law which could if the proceedings were between subjects be relied upon by the defendant as a defence to proceedings, whether in whole or in part, or otherwise, may subject it by express provision to the contrary be so relied upon by the government.

E

[84] Section 39 is only available where one is dealing with 'written law'; and not where it is otherwise. Where that written law provides for a specific right of action, arguably, it may be suggested that the government may have recourse to the same. But that is where there is express provision in the written law. And, there are quite a few pieces of legislation to this effect. The following are examples of express rights of action, especially a civil remedy which are afforded in the event of breach of obligations or responsibilities: s 128 of the Street, Drainage and Building Act 1974 ('Act 133'), s 156 of the Local Government Act 1976 ('Act 171'), s 55 of the Town and Country Planning Act 1976 ('Act 172'), s 77 of the Animals Act 1953 ('Act 647'), s 72 of the Customs Act 1967 ('Act 235') and s 155 of the Securities Commission Act 1993 ('Act 498').

F

G

[85] In each of the above examples, and there would be many more of like nature, there is specific provision of a remedy in the event of a breach or a failure to see to the obligation or responsibility cast. Where the government is not mentioned, the government may nevertheless rely on s 39 of the Government Proceedings Act 1956 to make the claim for damage or loss or debt, as the case may be.

H

I

[86] However, a perusal of PAA does not show a creation of the right in the sense suggested by the learned SFC. The only two rights provided for are to be found in ss 4 and 5 and that is in respect of the right to organise assembly or participate in assembly; and the rights of persons who have interests. Section 3

defines a 'person who has interests' means a person residing, working or carrying on business or having or owning residential or commercial property in the vicinity of or at the place of assembly. On the facts, the police on whose behalf the claim is initiated cannot fall within the meaning and operation of the phrase a 'person who has interests'. It will further be straining the language of this provision to say that the government falls within that same category and meaning of a 'person who has interests'. In any case, s 5 must be read in its entirety; it provides for such persons to be accorded the right to be informed of the details of an assembly in the manner specified in s 12; the object being to enable such a person 'to raise concerns or objections to the assembly'. Neither the police nor the government can associate themselves to be such persons since s 12 provides for how the interests of such persons are to be dealt with by the officer in charge of the relevant police district.

[87] A perusal of PAA in effect, shows that the violations of certain obligations result in penal sanctions. For instance, this is evident from ss 4(2), 9(5), 15(3) to name a few.

[88] Quite aside from the above, where the legislation is intended to also apply to the government, the usual practice is to insert express provisions in the statute itself to this effect stating that 'this Act applies to the Government'. An example is s 3 of the Arbitration Act 2005 ('Act 646') while a more recent example would be the Construction Industry Payment and Adjudication Act 2012 where s 2 provides that the Act applies to construction contracts entered into by the government:

> Application
>
> 2 This Act applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the government.

[89] In the absence of express words to the contrary and given the character of rights found in PAA, it would put a tremendous strain on the interpretation and construction of the Act if this court were to accede to the learned SFC's submission. More so when the damage is necessarily that which is consequential and collateral to the execution of duty on the part of the police, regardless whether the tortfeasor is identified or otherwise. Any breach or violation of the rights under PAA is adequately addressed by the realm of criminal law. In fact, in appropriate instances, the law of crimes as found in the Criminal Procedure Code and the Penal Code do provide for the payment of compensation to victims of crime. This, however, is not one such instance and the government cannot claim under cover as a victim. The argument of learned SFC is therefore without merit.

Dismissing the appeal on the breach of duty of care by the defendants and allowing the appeal against the counterclaim of the seventh defendant in part.

Reported by Kohila Nesan